Nos. 19-55526, 19-55707, 19-55708, 19-55718, 19-55725, 19-55727, 19-55728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER; SANTA BARBARA CHANNELKEEPER; PEOPLE OF THE STATE OF CALIFORNIA; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICALDIVERSITY; AND WISHTOYO FOUNDATION,
Plaintiffs/Appellees/Cross-Appellants,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, *et al.*,
Defendants/Appellants/Cross-Appellees,

and

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Intervenor-Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Central District of California
Nos. 2:16-cv-08418, 2:16-cv-08473, 2:16-cv-09352 (Hon. Philip S. Gutierrez)

CENTER FOR BIOLOGICAL DIVERSITY AND WISHTOYO FOUNDATION'S FIRST BRIEF ON CROSS-APPEAL

Kristen Monsell
Emily Jeffers
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: 510-844-7100
Email: kmonsell@biologicaldivesity.org
Email: ejeffers@biologicaldiversity.org

Attorneys for Plaintiffs/Appellees/Cross-Appellants
Center for Biological Diversity and Wishtoyo Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26-1 of the Federal Rules of Appellate Procedure, the Center for Biological Diversity and Wishtoyo Foundation certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Date: February 28, 2020

/s/ *Kristen Monsell*
Kristen Monsell
Emily Jeffers
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: 510-844-7100
Email: kmonsell@biologicaldivesity.org
Email: ejeffers@biologicaldiversity.org

Attorneys for Plaintiffs/Appellees/Cross-Appellants Center for Biological Diversity and Wishtoyo Foundation

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INTRODUCTION

Offshore hydraulic fracturing (fracking) and acidizing are controversial, unconventional oil extraction techniques that heighten the inherently dangerous effects of offshore drilling. While there are critical data gaps regarding the impacts of these practices on the marine environment, what is known raises significant concerns. Offshore fracking and acidizing increase the risk of oil spills and earthquakes; use toxic chemicals that threaten water quality, marine life, and important cultural resources; and prolong offshore drilling operations.

In 2016, the Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement (the Bureaus)—agencies within the U.S. Department of the Interior charged with managing oil and gas drilling in federal waters—issued a decision authorizing the use of fracking and acidizing at all active leases on the Pacific Outer Continental Shelf (OCS). The Bureaus did so without first preparing an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), and without consulting the expert wildlife agencies about the impacts of these oil extraction techniques on threatened and endangered species under the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2). Instead, the Bureaus issued a cursory programmatic environmental assessment (PEA) and finding of no significant impact (FONSI).

Plaintiffs-Appellees-Cross-Appellants the Center for Biological and Wishtoyo Foundation (the Center) filed suit because the Bureaus' PEA and FONSI—the *first* analysis of the impacts of offshore fracking and acidizing on the Pacific OCS the Bureaus have *ever* conducted—failed to take the "hard look" at the numerous harmful impacts of these practices mandated by NEPA. The Center also challenged the Bureaus' failure to prepare an EIS under NEPA and the Bureaus' failure to consult under the ESA.

The District Court correctly held that the decision at issue constitutes a "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. § 551, and that the Center's ESA claims are ripe for review. The Bureaus' contrary arguments ignore the pertinent facts and are foreclosed by overwhelming caselaw confirming the justiciability of the Center's claims.

The District Court also correctly held that the Bureaus' decision authorizing offshore fracking and acidizing on the Pacific OCS meets the broad definition of "agency action" under the ESA and that the agencies violated the ESA by not completing consultation prior to issuing their decision. The District Court issued appropriate, narrowly tailored relief for this serious legal error by enjoining the Bureaus' issuance of permits allowing offshore fracking and acidizing until ESA consultation is complete. In doing so, the District Court applied the proper legal

standards and considered the relevant facts, including evidence of the irreparable harm that would likely befall ESA-protected animals absent an injunction.

The District Court erred, however, in holding that the Bureaus' PEA and FONSI satisfied the agencies' NEPA obligations. The impacts of offshore fracking and acidizing are highly controversial, involve unique or unknown risks, have cumulatively significant impacts, and may adversely affect important cultural resources and ESA-protected species. The Bureaus' decision to forego an EIS was thus improper. Moreover, the Bureaus' PEA and FONSI ignore the indirect and cumulative impacts of offshore fracking and acidizing—including the impacts of prolonged drilling the Bureaus admit will occur—and fail to examine a reasonable range of alternatives to allowing the unrestricted use of these dangerous practices.

The Bureaus' numerous failures mean they authorized the use of offshore fracking and acidizing at all active leases on the Pacific OCS without first conducting the careful, comprehensive analyses required by law. The Court should uphold the District Court's ruling on the ESA claim and the injunction, and overrule the District Court's ruling on the NEPA claims.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 because the Center's claims are based on federal law. This Court has appellate jurisdiction

under 28 U.S.C. § 1291. The District Court entered judgment on December 13, 2018, 1-ER-0007-09, and denied Intervenor-Defendant-Appellant DCOR, LLC (DCOR)'s Motion for Partial Amendment of Judgment or Partial Relief from Order on April 23, 2019. 1-ER-0001-06.

The Bureaus and Intervenor-Defendants-Appellants appealed within the 60 days allowed for appeals when a U.S. agency is a party. *See* Fed. R. App. P. 4(a)(1)(B)(ii); 1-ER-96-119, 1-ER-121-28. The Center timely filed a cross-appeal. *See* Fed. R. App. P. 4(a)(3); 1-ER-95.

ADDENDUM STATEMENT

An addendum containing relevant statutory and regulatory authorities in addition to those already submitted by Intervenor-Defendants-Appellants is appended to this brief.

ISSUES PRESENTED

1. Whether the Bureaus' PEA and FONSI, which allow the use of offshore fracking and acidizing at all active oil and gas leases in federal waters off California, constitute a final agency action under the APA.

2. Whether the Center's NEPA and ESA claims are ripe for review.

3. Whether the Bureaus' decision to allow offshore fracking and acidizing constitutes agency action under the ESA.

4. Whether the Bureaus violated NEPA by:

a. Failing to prepare an EIS even though the impacts of offshore fracking and acidizing are highly controversial, have unique and unknown impacts, may have cumulatively significant impacts, impact geographically unique areas, and may adversely affect ESA-protected species; and

b. Issuing a PEA and FONSI that fail to take a "hard look" at the impacts of offshore fracking and acidizing and fail to examine a reasonable range of alternatives.

5. Whether the District Court abused its discretion by enjoining the issuance of permits allowing the use of offshore fracking and acidizing pending the Bureaus' compliance with the ESA, and denying DCOR's motion to amend the judgment.

STATEMENT OF THE CASE

This case challenges the Bureaus' 2016 decision to authorize the use of offshore fracking and acidizing—also known as "well stimulation treatments" (WST)—in the Pacific Ocean. *See* 7-ER-1201. Specifically, the Bureaus issued a PEA and FONSI that "allow the use of selected well stimulation treatments . . . on the 43 current active leases and 23 operating platforms on the Southern California [OCS]." *Id.* The Bureaus issued their decision without first conducting the careful, thorough review of the environmental impacts of these practices required by

NEPA, and without first completing ESA consultation with the expert wildlife agencies to evaluate their impacts on threatened and endangered species.

I. OFFSHORE DRILLING IN THE PACIFIC OCEAN

At the time the Bureaus issued their decision, the Pacific OCS region was home to 43 active oil and gas leases. 7-ER-1215. Drilling activities occur under these leases from 23 platforms off the coast of Southern California. *Id.* Fifteen of the platforms are in the Santa Barbara Channel, four are off Long Beach, and four are in the Santa Maria Basin. 7-ER-1241-42. Oil companies installed the platforms between 1967 and 1989. *Id.* They have been drilling for roughly 30 to 50 years under development and production plans approved decades ago. *See id.*

These platforms are located in one of the most significant and diverse seascapes in the world, with a vast array of habitats, coastal and marine species, and important cultural resources. For example, the Santa Barbara Channel is habitat for several ESA-listed species, including blue whales, humpback whales, sea turtles, southern sea otters, and black abalone, and designated critical habitat for western snowy plovers and black abalone. 7-ER-1277, 7-ER-1293, 7-ER-1300-01, 7-ER-1305. Since time immemorial, the Chumash Peoples have depended upon the cultural resources within the Santa Barbara Channel—from Point Conception to Malibu and out to and around the Channel Islands—to maintain their ways of life, cultural practices, and ancestral connections. 2-SER-518.

II. THE RISKS OF OFFSHORE FRACKING AND ACIDIZING

Offshore fracking and acidizing are unconventional oil extraction techniques that enable continued production from declining reservoirs and threaten the marine and coastal environment. *See* 7-ER-1201. Offshore fracking involves injecting a mixture of water, a proppant (typically sand or ceramic materials), and chemicals into a well at high pressure to fracture rock below the seafloor and create passages for oil and gas. 7-ER-1202-03; *see also Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 3d 1140, 1145 (N.D. Cal. 2013) (describing process and its recent proliferation due to technological advancements). Acid fracturing is similar to hydraulic fracturing except that instead of using a proppant, an acid solution is used to etch channels in the rock walls, creating pathways for oil and gas. 7-ER-1203. Matrix acidizing is a non-fracturing process in which hydrochloric acid and other acids are mixed with chemicals and injected underground to dissolve oil bearing rock. *Id.* The Bureaus' decision allows each of these practices on the Pacific OCS. *See* 7-ER-1201.

While there are many uncertainties regarding the impacts of these practices on the marine environment, what is known raises numerous concerns. For example, scientific research indicates the chemicals used in fracking can harm aquatic animals and other wildlife. 2-SER-414-415. As one illustration, some chemicals used in fracking can break down into nonylphenol, a toxic substance

with a wide range of harmful effects, including the development of intersex fish, reduced growth and survival of invertebrates, and bioaccumulation in sea otters. 2-SER-376, 2-SER-379. A recent study found that oil companies use dozens of hazardous chemicals to acidize wells in California, including known carcinogens, mutagens, reproductive and developmental toxins, and endocrine disruptors. 2-SER-345-47. This is a significant concern for waters off California, where the Environmental Protection Agency (EPA) allows oil companies to dump more than nine billion gallons of produced water,[1] including chemicals used in well stimulations, each year. *See* 3-SER-589-90, 3-SER-592.

The use of offshore fracking and acidizing also emits dangerous air pollutants, including carcinogens and endocrine disruptors. 2-SER-465, 2-SER-479, 2-SER-388-89. Additionally, the high pressures used in these practices can increase the risk of oil spills, especially in older wells, 1-SER-135, and can increase the risk the risk of earthquakes. 2-SER-440. Offshore fracking and acidizing also prolong drilling operations by enabling oil companies to extract oil that would be inaccessible using conventional methods. *See, e.g.*, 7-ER-1201, 7-ER-1218. In these ways, offshore fracking and acidizing increase the myriad risks of conventional offshore drilling.

[1] Produced water is the waste fluid that returns to the surface along with produced oil and gas, and contains the chemicals originally injected into the wells. 7-ER-1269.

III. THE BUREAUS' PROGRAMMATIC DECISION TO ALLOW OFFSHORE FRACKING AND ACIDIZING ON THE PACIFIC OCS

In 2013, a series of document requests revealed that the Bureaus were issuing permits allowing oil companies to frack wells in federal waters off California without ever having evaluated their environmental impacts. 3-ER-0404. Accordingly, the Center sued the agencies, alleging their issuance of fracking permits violated several environmental laws, including NEPA. 1-ER-0011. The Environmental Defense Center also filed a lawsuit alleging violations of NEPA. *Id.* Both cases resulted in similar settlement agreements, in which the Bureaus agreed to (1) review the environmental impacts of offshore fracking and acidizing on the Pacific OCS under NEPA, and (2) implement a moratorium on their use pending completion of environmental review via a PEA and FONSI or EIS and record of decision. 1-ER-0011-12, 2-SER-557.

The Bureaus issued a draft environmental assessment in February 2016. 1-ER-0012. In their draft, the Bureaus stated that "[t]he purpose of the proposed action is to allow the use of certain WSTs (e.g., hydraulic fracturing) in support of oil production at platforms on the Pacific OCS." 2-SER-546.

The Bureaus accepted public comments for 30 days. 8-ER-1433. The agencies received thousands of comments from concerned individuals urging them to prohibit the use of offshore fracking given the risks to the environment. 8-ER-

1434. The Bureaus also received numerous comments from scientists, government agencies, and elected officials documenting known harms from fracking and acidizing; highlighting critical data gaps regarding their impacts on the marine environment; and disagreeing with the Bureaus' conclusion there would not be significant impacts from the use of these well stimulations on the Pacific OCS. *See, e.g.*, *id.*; 1-SER-144-46 (comments from members of U.S. Congress), 2-SER-299-301 (comments from state oil regulators), 2-SER-520-22 (comments from scientists), 2-SER-523-25 (comments from state legislators), 2-ER-526-32 (comments from California Coastal Commission), 2-SER-540-41 (comments from Los Angeles City Councilmember).

Nevertheless, the Bureaus did not prepare an EIS. Instead, they issued a PEA and FONSI in May 2016. 7-ER-1183, 6-ER-1172-79. The PEA and FONSI state that "the purpose of the proposed action . . . is to enhance the recovery of petroleum and gas from new and existing wells on the [Pacific] OCS, beyond that which could be recovered with conventional methods (i.e., without the use of WSTs)." 7-ER-1201, 6-ER-1172. The Bureaus conducted their analysis to determine whether the proposed action would result in significant impacts; and "whether the Proposed Action would cause undue or serious harm or damage to the human, marine, or coastal environment," 6-ER-1172, and thus be prohibited under the Outer Continental Shelf Lands Act (OCSLA) —the statute governing the

Bureaus' management of offshore drilling. *See* 30 C.F.R. § 550.202(e); *see also* 43 U.S.C. § 1802(2)(B) (requiring the Bureaus to balance offshore oil production "with protection of the human, marine, and coastal environments").

The Bureaus compared the proposed action to three alternatives, each of which would have reduced or eliminated the environmental harms of offshore fracking and acidizing. 6-ER-1175-76; 7-ER-1203-04. Specifically, Alternative 2 considered allowing well stimulations at depths of more than 2,000 feet below the seafloor to reduce the likelihood that fracking operations would intersect an existing fault and result in an oil spill. 7-ER-1204. Alternative 3 considered allowing well stimulations but prohibiting the dumping of well stimulation wastewater into the ocean to eliminate any potential effects of those discharges on the marine environment. *Id.* Alternative 4—the "no action" alternative—would prohibit the use of well stimulations and "eliminate all effects of the[ir] use." *Id.*

The Bureaus' FONSI concludes that "implementing the Proposed Action" of allowing the use of well stimulations at all active leases on the Pacific OCS without restrictions "does not constitute a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." *See* 6-ER-1179; 7-ER-1201.

Despite a multitude of comments highlighting the deficiencies in the agencies' analysis and conclusions, the Bureaus made only minor changes in the

final PEA. *See, e.g.*, 8-ER-1437 (the Bureaus' statement that they "stand by the conclusions" in the draft assessment). The Bureaus did not engage in ESA consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) prior to issuing their decision. *See* 8-ER-1468. The Bureaus' decision lifted the moratorium on offshore fracking and acidizing on the Pacific OCS. *See* 1-ER-0012-13.

IV. PROCEEDINGS BELOW

The Center filed this case in 2016, alleging that the Bureaus' PEA and FONSI violated NEPA and that their failure to consult violated the ESA. *Id.* The Environmental Defense Center and Santa Barbara Channelkeeper filed a similar lawsuit. *Id.* The State of California and California Coastal Commission also filed a lawsuit, arguing that the Bureaus' PEA and FONSI violated NEPA and that the agencies violated the Coastal Zone Management Act (CZMA) by failing to prepare a determination whether the use of well stimulations is consistent to the maximum extent practicable with the enforceable policies of California's coastal management program. *Id.* The District Court consolidated all three cases. 1-ER-0013.

The Bureaus and Intervenor-Defendant-Appellant American Petroleum Institute (API) filed motions to dismiss the cases, claiming that the District Court lacked jurisdiction to hear the NEPA and CZMA claims because the issuance of the PEA and FONSI was not a final agency action under the APA. *Id.* The Bureaus

also argued that the ESA claims were not ripe and that they were moot in light of two biological assessments the Bureaus completed just days before they filed their motion to dismiss. *Id.*; 5-ER-843-903, 5-ER-910-1000.

The District Court denied the motions. 1-ER-0013. It held that the FONSI was a final agency action under the APA because it was "the final step" in the Bureaus' NEPA process "and allowed the WST permitting process to proceed." 1-ER-0086. In reaching this decision, the District Court relied on the extensive caselaw from this and other circuits holding "that final NEPA documents constitute final agency actions that are immediately justiciable to procedural challenges." 1-ER-0085. The District Court also emphasized fact that the agencies would not have to conduct another programmatic analysis before issuing well stimulation permits. 1-ER-0086. The District Court ruled that the ESA claims were ripe and not moot because, although the agencies had started the required ESA consultations after this case commenced, the consultations had not been completed. *Id.*

The cases then proceeded on cross motions for summary judgment. *Id.* In a detailed opinion following a hearing, the District Court held that the Bureaus' decision triggered their duty to consult with FWS and NMFS under section 7 of the ESA, 16 U.S.C. § 1536(a)(2). 1-ER-0035-36. With respect to species under FWS's jurisdiction, the District Court held that the Bureaus were in violation of the ESA by failing to complete formal consultation with FWS regarding the impacts of

offshore fracking and acidizing on the western snowy plover and its critical habitat, the California least tern, and the southern sea otter. 1-ER-0038-39, 0043-44. The District Court ruled that the ESA claims were moot with respect to species under NMFS's jurisdiction because the Bureaus and NMFS had completed consultation during the pendency of the litigation. 1-ER-0041. The District Court also held that the Bureaus violated CZMA by failing to conduct the requisite consistency review required by 16 U.S.C. § 1456(c)(1). 1-ER-0048. The District Court ruled for the Bureaus and Intervenors on the NEPA claims. 1-ER-0014-32.

The District Court then evaluated the proper standards for injunctive relief, considered the irreparable harm that could result absent an injunction, and enjoined the Bureaus from approving any plans or permits allowing offshore fracking and acidizing until the Bureaus complete the ESA consultation with FWS and the consistency review process under CZMA. 1-ER-0041-44, 1-ER-0049. DCOR subsequently filed a Motion for Partial Amendment of Judgment or Partial Relief from Order, asking the District Court to allow the Bureaus to approve two permit applications so DCOR could frack offshore wells. 2-ER-0129-152. All three sets of Plaintiffs-Appellees-Cross-Appellants opposed the motion. 1-ER-0001. The District Court denied the motion in a written opinion. 1-ER-0001-06. This appeal followed.

SUMMARY OF ARGUMENT

1. The Bureaus' PEA and FONSI constitute final agency action under the APA. The Bureaus' contrary arguments conflict with considerable Ninth Circuit caselaw holding that a FONSI constitutes a final agency action. *See, e.g.*, *Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007); *Friedman Bros. Inc. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982); *Hall v. Norton*, 266 F.3d 969, 975, n.5 (9th Cir. 2001); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 598 (9th Cir. 2010). This precedent controls here. The Bureaus' decision is the agencies' final word on the environmental impacts of their decision to allow the use of offshore fracking and acidizing at all active leases on the Pacific OCS. That the Center may separately challenge future, site-specific permits does not somehow render the Bureaus' decision non-final.

2. The Center's NEPA and ESA claims are ripe for review. The Supreme Court has made clear that a challenge to a programmatic NEPA decision is reviewable when the decision is issued, and the Ninth Circuit has consistently held that a plaintiff is fully justified in taking advantage of what may be its only opportunity to challenge the programmatic analysis. *E.g.*, *Cal. ex rel. Lockyer v. USDA*, 575 F.3d 999, 1011 (9th Cir. 2009). Likewise, "[t]he Ninth Circuit has undeniably interpreted [the] ESA to require consultation on programmatic actions and rules, including consultation at the planning stage, not just the site-specific

stage." *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1095 (N.D. Cal. 2007) (citing *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053-55 (9th Cir. 1994)). Delayed review would contravene section 7's basic purpose: to avoid and mitigate harm to ESA-protected species at the earliest stage possible. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019-20 (9th Cir. 2012) (*en banc*) (discussing importance of ESA consultation).

3. The Bureaus' decision constitutes an agency action under the ESA. The PEA and FONSI allow the use of offshore fracking and acidizing at all active leases on the Pacific OCS, and the Bureaus had the discretion to prohibit or condition these practices to protect ESA-listed species. The decision thus meets this Court's test for agency action under the ESA. *See id.* at 1011, 1024-25. The agencies' failure to complete consultation prior to issuing that decision violates the ESA.

4. The District Court erred in ruling that the Bureaus complied with NEPA. The use of offshore fracking and acidizing implicate several NEPA significance factors: the environmental impacts are highly controversial and uncertain; there may be cumulatively significant impacts; and their use threatens culturally significant areas and ESA-listed species. NEPA thus required the Bureaus to prepare an EIS analyzing the impacts of these inherently dangerous oil extraction techniques on the Pacific OCS. Their failure to do so was unlawful.

Additionally, the Bureaus' PEA and FONSI fail to take a hard look at the myriad impacts from allowing offshore fracking and acidizing on the Pacific OCS or examine a reasonable range of alternatives to allowing their unrestricted use. The Bureaus ignored several indirect and cumulative impacts, including those from prolonging oil and gas operations off the California coast. The Bureaus' failure to examine the impacts of prolonged offshore drilling is particularly glaring considering the entire purpose of the Bureaus' proposal is to allow the use of offshore fracking and acidizing to enable oil companies to extract oil that would be unattainable using conventional methods. The Bureaus' myopic analysis is precisely what NEPA seeks to prevent. *See S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (noting the importance of comprehensive NEPA analysis).

5. The District Court properly enjoined the Bureaus' issuance of permits and plans allowing offshore fracking and acidizing pending completion of ESA consultation with FWS. The District Court applied the correct test and its order is narrowly tailored to remedy the Bureaus' substantial legal violation. The District Court did not presume irreparable harm, but made specific findings based on the record before it, including the Bureaus' own statements regarding the various harms offshore fracking and acidizing would likely have on ESA-listed species. The District Court's findings are in line with this Court's instruction that harm to

members of an ESA-listed species is irreparable. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018) (citations omitted). Likewise, the District Court did not abuse its discretion in denying DCOR's motion to amend the judgment. DCOR's alleged financial harm from temporarily not being allowed to frack offshore wells simply cannot trump the significant environmental interests at issue in this case.

ARGUMENT

I. STANDARD OF REVIEW

This Court "reviews the district court's summary judgment de novo, applying the same standards that applied in the district court." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). The APA provides the standard of review for both the NEPA and ESA claims at issue. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). The APA directs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The APA's standard of review "requires the court to engage in a substantial inquiry, a thorough, probing, in-depth review." *Siskiyou Reg'l Educ. Proj. v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009) (citations, alterations, and internal quotation marks omitted). Courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citation omitted).

This Court reviews a district court's decision to issue injunctive relief for an abuse of discretion. *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018). A two-part test governs. *Id.* First, this Court must "determine de novo whether the [district] court identified the correct legal rule to apply." *Id.* If so, this Court will reverse only "if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (citation omitted).

This Court reviews a district court's decision to deny a motion to amend a judgment or motion for relief from judgement under the abuse of discretion standard. *Thompson v. Housing Auth. of L.A.*, 782 F.2d 829, 832 (9th Cir. 1986); *McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003).

II. THE CENTER'S NEPA CLAIMS CHALLENGE FINAL AGENCY ACTION

This Court has jurisdiction over the Center's NEPA claims because the

Bureaus' PEA and FONSI constitute final agency action under the APA. The APA authorizes judicial review of "final agency actions." 5 U.S.C. § 704; *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). Under the APA, there is a presumption that agency decisions are reviewable. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

The Bureaus' argument that the Center's claims are unreviewable because the Bureaus "did not actually reach any decision or take any action" and "merely provided a basis for possible future action" Fed. Br. 12, 14, contravenes the pertinent facts and caselaw.[2] Indeed, the very first sentence of the PEA states that the Bureaus "*propose to allow the use* of well stimulation treatments," 7-ER-1201 (emphasis added), and a wealth of caselaw from this and other circuits confirms that final NEPA documents are final agency actions. *See, e.g.*, *supra*, p. 15; *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1118 (9th Cir. 2010) (once an agency's NEPA analysis has been "solidified" in a NEPA decision document, "an agency has taken final agency action, reviewable under [the APA]"); *Sierra Club v. Army Corps of Engr's*, 446 F.3d 808, 816 (8th Cir. 2006) (FONSI was final agency

[2] The Court owes no deference to the Bureaus' interpretation of whether their decision constitutes final agency action because Congress did not charge them with implementing the APA. *See Karuk Tribe*, 681 F.3d at 1017 ("agency's interpretation of a statute outside its administration is reviewed *de novo*").

action because, even though prerequisites to breaking ground on the underlying project remained unmet, the "decision to issue a FONSI was the culmination of the agency's NEPA decision-making"); *Cure Land, LLC v. USDA*, 833 F.3d 1223, 1231 (10th Cir. 2016) (a FONSI is a "final agency action" because it is the final step in the agency's NEPA decisionmaking process and "there is no indication [it] . . . is tentative or interlocutory in nature.").

The District Court correctly held that the Bureaus' PEA and FONSI constitute final agency action because: (1) they "grant[] 'approval or other form of permission' to the Proposed Action." 1-ER-0084 (citing *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1088 (9th Cir. 2003)); and (2) are the Bureaus' final word on the environmental impacts of that proposal. 1-ER-0086.[3] This Court should affirm the District Court's well-reasoned decision on this issue.

A. The Bureaus' Decision Constitutes Final Agency Action Under the APA

The Bureaus' PEA and FONSI—which "allow the use of" offshore

[3] Neither the Bureaus nor Intervenors "specifically and distinctly" contest the District Court's ruling that the Bureaus' decision is an "agency action" under the APA, nor its ruling that it is a "major federal action" under NEPA. They have therefore waived this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Regardless, the Bureaus' decision constitutes an "agency action" under the APA, and a "major federal action" under NEPA. *See* 5 U.S.C. § 551(6), (8), (13) (defining agency action to include "the whole or a part of an agency permit, approval, . . . or other form of permission"); 40 C.F.R. § 1508.18(a) (major federal actions include "new and continuing activities, including projects and programs entirely or partly. . . regulated, or approved by federal agencies").

fracking and acidizing at all active leases on the Pacific OCS, 7-ER-1201—constitutes a final agency action under the APA. An agency action is final and reviewable under the APA when two conditions are met. First, the action must be the "'consummation' of the agency's decision-making process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Second, the action must determine "rights or obligations" or be one "from which legal consequences flow." *Id.* at 178 (citation omitted). In determining whether an action is final, courts must look to whether it "amounts to a definitive statement of the agency's position." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d at 982 (citations omitted). The focus is on the action's practical and legal effects: "the finality element must be interpreted in a pragmatic and flexible manner." *Id.* (citation omitted). The PEA and FONSI easily satisfy both conditions.

First, the Bureaus' PEA and FONSI constitute the consummation of the agencies' decisionmaking on the environmental impacts of well stimulations on the Pacific OCS. The FONSI concludes that the Bureaus' proposal to allow offshore fracking and acidizing at all active leases off California will not have a significant impact on the environment, and that no EIS is required. 6-ER-1179. This is the Bureaus' final word on the environmental impacts of their proposed action. *See Kern v. BLM*, 284 F.3d 1062, 1070-71 (9th Cir. 2002) (as "the rights conferred by NEPA are procedural rather than substantive," plaintiffs challenging a final NEPA

document "are able to show. . . a completeness of action by the agency"). Indeed, the Bureaus admitted as much in their briefing below when they stated that the "FONSI provides the agencies' *conclusions* regarding the analysis conducted and determined that an EIS was not required," 1-SER-110 (emphasis added), and "*concluded* the procedural analysis contained in the PEA." 1-SER-111 (emphasis added); *see also* 43 C.F.R. § 46.325 (Department of the Interior regulation stating that a FONSI "concludes" the environmental assessment process).

Second, legal consequences flow from the Bureaus' PEA and FONSI. There are "several avenues for meeting th[is] second finality requirement," including actions that "will directly affect the parties." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d at 982, 986. Here, as the District Court rightly found, the Bureaus' PEA and FONSI satisfy this requirement because they "allowed the WST permitting process to proceed." 1-ER-0086.

While the Bureaus insist that their actions have no consequences, this self-serving characterization does not hold water. "It is the effect of the action and not its label that must be considered." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d at 985 (citations omitted). The Bureaus' PEA states that they prepared the analysis to determine whether, and under what circumstances, offshore fracking and acidizing can proceed on the Pacific OCS in light of OCSLA regulations commanding that offshore drilling activities not "cause undue or serious harm or

damage to the human, marine, or coastal environment." 6-ER-1172; 30 C.F.R. § 550.202(e). The first sentence of the PEA states that the Bureaus "propose to *allow the use* of selected well stimulation treatments" at all active leases on the Pacific OCS. 7-ER-1201 (emphasis added).

The Bureaus' FONSI implements the proposed action, which allows oil companies to use offshore fracking and other well stimulations on leases throughout the Pacific OCS. 6-ER-1179, 7-ER-1201. The Bureaus' PEA and FONSI declined to adopt an alternative that would prohibit the issuance of such permits in the future, or other alternatives that would prohibit well stimulations in shallow areas and the dumping of well stimulation wastewater into the ocean to reduce the risk of harms to the environment. 7-ER-1204, 7-ER-1226-28, 7-ER-1362, 6-ER-1175-76. The Bureaus' rejection of these alternatives means they can allow oil companies to use well stimulations in shallow areas, and without prohibiting the dumping of fracking wastewater into the ocean, in the future.

Moreover, the Bureaus' PEA and FOSNI ended the moratorium on offshore fracking and acidizing. *See, e.g.*, *Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1163 (D. Haw. 2001) (legal consequences flowed from an EA and FONSI because it authorized the resumption of certain military training activities). The Bureaus attempt to dismiss the impact of the moratorium by stating it was not issued under a "formal order" and instead was part of a settlement. Fed. Br. 17. But this is of no

consequence. The PEA and FONSI clearly state that the Bureaus "propose to *allow the use* of selected well stimulation treatments," 7-ER-1201 (emphasis added), and the district court correctly held that "the EA is fairly read to reflect a proposal for returning to something approximating the pre-moratorium status quo whereby [the Bureaus] allowed fracking and acidizing on the P[acific] OCS." 1-ER-0017.

Finally, the Bureaus' PEA and FONSI mean they will not complete an EIS to conduct further environmental review of the use of well stimulations on the Pacific OCS. This decision deprives the Center of additional information regarding the impacts of offshore fracking and acidizing, and of additional public participation that would have been provided through the EIS process. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989) (publication of draft and final EIS provide for public participation and "broad dissemination of relevant environmental information"); 1-ER-0086 (District Court's determination the finality test was satisfied because, *inter alia*, the Center suffered a procedural injury).

B. This Court Has Consistently Held Similar Actions Are Final Agency Actions Under the APA

This Court has routinely found similar programmatic decisions justiciable, final actions. *See supra*, p. 15 (referencing cases). For example, in *Sierra Forest Legacy v. Sherman*, the Court found a NEPA challenge to an EIS for a land

management plan fit for review because while the plan "d[id] not itself authorize the cutting of any trees," it set goals, "select[ed] the areas of the forest that are suited to timber production, and determine[d] which probable methods of timber harvest are appropriate." 646 F.3d 1161, 1179 (9th Cir. 2011) (citation omitted).

Similarly, in *California Wilderness Coalition v. U.S. Department of Energy*, this Court held that an agency's designation of an area as a "national interest electric transmission corridor," which made a permitting process available to utilities seeking permits for transmission lines within the corridor, constituted a final agency action subject to NEPA. 631 F.3d 1072, 1098-99 (9th Cir. 2011). The Court reached this conclusion even though the designation did not approve any particular permits or determine the location of the transmission facilities because the designation established boundaries for potential transmission lines and influenced where they could be permitted in the future. *Id.* at 1098, 1100.

Likewise here, the Bureaus' PEA and FONSI establish that offshore fracking and acidizing can occur at all active leases on the Pacific OCS and determine the probable ways in which such practices can be used, i.e., without restrictions on the discharge of fracking fluids into the ocean or minimum depth requirements. The Bureaus admit that they will rely on the PEA and FONSI in making site-specific decisions. *E.g.*, Fed. Br. 20; 8-ER-1468.

In support of their position, the Bureaus largely rely on irrelevant cases from the D.C. Circuit, such as *Public Citizen v. Office of the U.S. Trade Representative*, which involved draft, incomplete trade agreements from ongoing trade negotiations. *See* 970 F.2d 916, 918-19 (D.C. Cir. 1992). *Pacific Rivers Council v. Thomas* is the only Ninth Circuit case the Bureaus cite to support their contention that the agency action here is not final. Fed. Br. 19-20. But that case compels the opposite conclusion. In *Pacific Rivers Council*, this Court held that a resource management plan constituted agency action under the ESA because it set forth guidelines and criteria for future logging, grazing, and road construction projects. 30 F.3d at 1055-56.

The Bureaus' argument that no similar "standards and guidelines" exist in the PEA and FONSI, Fed. Br. 20, misses the mark. The only reason such standards do not exist here is because the proposed action the Bureaus adopted does not contain any restrictions on the use of offshore fracking or acidizing on the Pacific OCS. The Bureaus considered and dismissed alternative options, including prohibiting the discharge of fracking fluids into the ocean and minimum depth requirements, which would have provided some of the "standards and guidelines" that the Bureaus now claim to need to be considered "agency action."

That the Bureaus might do site-specific review in the future, Fed. Br. 12-21, does not somehow transform their final programmatic decision on the

environmental impacts of their proposal to allow well stimulations into an interlocutory one.[4] Nor does it deprive that decision of legal consequences. As the Ninth Circuit has repeatedly confirmed, "a procedural NEPA violation is complete even before an implementing project is approved." *Sierra Forest Legacy*, 646 F.3d at 1180. As such, "the planning of site-specific action *vel non* is irrelevant to the [justiciability] of an action raising a procedural injury" under NEPA. *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 977 (9th Cir. 2003). The Court should uphold the District Court's ruling that the Bureaus' PEA and FONSI constitute final agency action.

III. THE CENTER'S NEPA AND ESA CLAIMS ARE RIPE

The Bureaus challenge the ripeness of the Center's NEPA and ESA claims, incorrectly arguing that their PEA and FONSI "does not authorize the use of well stimulation treatments and thus cannot affect the environment." Fed. Br. 23; *cf.* 7-ER-1201 (Bureaus' proposal "to allow the use of" well stimulations). To the contrary, because the Center's claims are based on procedural violations, the "claim[s] can never get riper." *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998).

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[4] The Bureaus' suggestion there is no final agency action because the District Court enjoined the agencies from issuing permits in the future, Fed. Br. 22, is unfounded. As this Court has recognized, "the injunctive relief authorized by the [ESA's] citizen suit provision . . . is by its very nature directed at future actions." *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995).

The Bureaus' arguments are based on prudential ripeness—a discretionary, "disfavored" doctrine. *Fowler v. Guerin*, 899 F.3d 1112, 1116 n.1 (9th Cir. 2018), *writ denied,* 140 S. Ct. 390 (2019). The Court should decline the Bureaus' invitation to dismiss the Center's claims on this basis.

If the Court decides to consider these arguments, it should reject them. The ripeness test considers whether: (1) there is a need for further factual development of the issue; (2) judicial review would interfere with additional administrative action; and (3) delayed review would cause the plaintiff hardship. *Cottonwood Envt'l Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1083-84 (9th Cir. 2015). The Center's NEPA and ESA claims readily satisfy this test.

A. The Center's NEPA Claims Are Ripe

The Center's NEPA claims are ripe. First, no additional factual development is necessary because the NEPA claims are based on a procedural injury. *See Ohio Forestry*, 523 U.S. at 737. The procedural injury occurred when the Bureaus refused to prepare an EIS and issued a PEA and FONSI that fail to adequately analyze relevant impacts. *See Citizens for Better Forestry*, 341 F.3d at 977.

Second, judicial intervention will not interfere with further administrative action. The Bureaus concluded that well stimulations on the Pacific OCS will not have any significant impacts on the environment. 6-ER-1179. Thus, the Bureaus'

decision "is at an administrative resting place." *Citizens for Better Forestry*, 341 F.3d at 977.

Third, delayed review will prejudice the Center because the Bureaus' programmatic decision "'will influence subsequent site-specific actions' and 'pre-determine[] the future.'" *Friends of the River v. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 978 (E.D. Cal. 2012) (alteration in original, quoting *Laub*, 342 F.3d at 1088, 1091). As this Court has recognized, "[t]he purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they retain[] a maximum range of options." *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (alteration in original, citations and quotation marks omitted). "This purpose would not be served if individuals aggrieved by a procedural violation must wait to challenge the [programmatic NEPA document] only after decisions to implement [the program] are made." *Los Padres Forest Watch v. BLM*, No. CV-15-4378-MWF-JEMx, 2016 U.S. Dist. LEXIS 138782, at *22-23 (C.D. Cal. Sept. 6, 2016); *see also Pit River Tribe*, 469 F.3d at 785 ("dilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review").

Moreover, the Bureaus' decision not to prepare an EIS deprives the Center of information and process to which they would otherwise be entitled. *See* 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 349-50. The PEA and FONSI fail to

inform relevant decisionmakers or the public of the harmful environmental effects flowing from the use of well stimulations on the Pacific OCS.

The Bureaus' reliance on the D.C. Circuit's decision in *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009) [*CBD*], is unavailing. *See* Fed. Br. 16. That case dealt with a challenge to a five-year plan—the first stage of the OCSLA process—which establishes when and where the Bureau may offer leases over the next five-year period. *CBD*, 563 F.3d at 473 (describing OCSLA process). In holding the petitioners' NEPA claims unripe under the caselaw of that circuit, the court noted that NEPA claims for "multiple-stage leasing programs" do not ripen "until the leases are issued." *Id.* at 480 (citation omitted). Here, both the lease sales and subsequent approvals of development and production plans occurred decades ago—meaning the agencies have long-since passed "that 'critical stage' where an 'irreversible and irretrievable commitment of resources' has occurred." *See id.* (citation omitted); 7-ER-1218.

The Bureaus are incorrect that the Center must wait until each site-specific permitting decision to challenge their faulty NEPA analysis. Rather, the Center is fully justified in "taking advantage of what may be [its] only opportunity to challenge [the decision] on a . . . programmatic basis." *Lockyer*, 575 F.3d at 1011; *see also Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1992) ("plaintiffs need not wait to challenge a specific project when their grievance is

with the overall plan"). That notion rings particularly loud for the PEA and FONSI at issue here—the first time the Bureaus analyzed the environmental impacts of offshore fracking and acidizing on the Pacific OCS.

The Bureaus argue this case is distinguishable from the long line of Supreme Court and Ninth Circuit cases holding that final programmatic NEPA documents "are ripe for judicial review immediately once they are complete, even if further agency action is required to authorize specific activities," Fed. Br. 23, 24, because in those cases the agencies had made their decision in a "record of decision" (ROD) and not in the NEPA documents themselves. But a ROD is a document NEPA requires upon the agency's completion of *an EIS*. *See* 40 C.F.R. § 1505.2.

Here, the Bureaus did not prepare an EIS because they determined there would not be significant impacts from its proposal. 6-ER-1179. The Bureaus' argument ignores that they issued not only a PEA, but also a FONSI, which is the agencies' final determination that authorizing offshore fracking and acidizing on the Pacific OCS would not have significant impacts. Issuance of the FONSI means the Bureaus "may proceed with the proposed action." *Te-Moak Tribe*, 608 F.3d at 599.

B. The Center's ESA Claims Are Ripe

The Center ESA claims are ripe for the same reasons its NEPA claims are. First, just like in *Cottonwood*, "[b]ecause the alleged procedural violation—failure

to [formally] consult[]—is complete, so too is the factual development necessary to adjudicate the case." 789 F.3d at 1084.

Second, judicial review will not interfere with further administrative action. In the PEA, the Bureaus state that they would not engage in ESA consultation on the programmatic decision to authorize well stimulations. 8-ER-1468. As such, the Bureaus have spoken their final word on the matter.

Finally, delayed review would cause hardship to the Center because time is of the essence in protecting endangered species. The ESA "mandate[s] that consultation must be complete as to the entire project before the action is initiated or any of its components undertaken." *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1246 (E.D. Cal. 2005) (citing *Conner*, 848 F.2d at 1453). Otherwise, the Bureaus could allow protected species to suffer a "slow slide into oblivion." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008). Delayed review would further undermine the "heart of the ESA" by failing to avoid and mitigate harm to protected species at the earliest stage possible. *Karuk Tribe*, 681 F.3d at 1019-20 (citation omitted).[5]

[5] The Bureaus make additional arguments as to why the ESA claims are allegedly unripe, Fed. Br. 25-27; however, because those arguments actually involve whether there is an "agency action" within the meaning of the ESA, they are addressed in Section IV below.

IV. THE BUREAUS' DECISION CONSTITUTES AGENCY ACTION UNDER THE ESA

The Bureaus' decision constitutes agency action under the ESA, triggering their consultation obligations. The ESA requires consultation with the expert wildlife agencies for any "agency action" that "may affect" a listed species or critical habitat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). As this Court has explained, the intent of the process is "to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Karuk Tribe*, 681 F.3d at 1020. "The consultation requirement reflects 'a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.'" *Id.* (quoting *Tenn. Valley Auth v. Hill*, 437 U.S. 153, 185 (1978)).

No party disputes the fact that the approval of well stimulations "may affect" ESA-listed species. Instead, the Bureaus and Intervenor-Defendant-Appellant ExxonMobil (Exxon) argued below, and continue to argue on appeal, that no "action" has taken place, and therefore the ESA's consultation requirements have not yet been triggered.[6] Exxon Br. 44-48, Fed. Br. 24-27. The District Court

[6] The Court owes no deference to the Bureaus' interpretation of whether their decision is an "agency action" under the ESA. *See Karuk Tribe*, 681 F.3d at 1017.

rejected this argument twice, and this Court should lay it to final rest. The Bureaus' PEA and FONSI satisfies the two step "agency action" test laid out in *Karuk Tribe*, 681 F.3d at 1021—it affirmatively authorized the use of offshore fracking and acidizing, and the Bureaus had the discretion to influence the activity for the benefit of ESA-listed species. The Bureaus' failure to consult violated the ESA, and this Court should uphold the District Court's decision on this issue.

A. The Center's ESA Claim Challenges Agency Action Under the ESA

The Center's ESA claims challenge an "agency action" under section 7. ESA regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02. "[T]he term 'agency action' is to be construed broadly." *Karuk Tribe*, 681 F.3d at 1021 (citations omitted). In the Ninth Circuit, "there is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Id.* at 1011. To trigger the consultation requirement, the agency's discretionary control "also must have the capacity to inure to the benefit of a protected species." *Id.* at 1024.

The Bureaus' PEA and FONSI allowing offshore fracking and acidizing on the Pacific OCS easily meet this test. First, as explained above, the Bureaus' PEA and FONSI adopt the proposed action of allowing the use of well stimulations at

all active leases on the Pacific OCS without conditions to mitigate their impacts. *See supra* pp. 23-25; *see also Pac. Rivers Council*, 30 F.3d at 1053, 1055 (resource management plan is agency action under the ESA because it sets out guidelines for managing forests); *Karuk Tribe*, 681 F.3d at 1011, 1024 (a "Notice of Intent" to authorize mining activities is an agency action under the ESA because it described "under what conditions" mining could proceed "and affirmatively decide[d] to allow the mining to proceed"); 1-ER-0088 (District Court ruling finding the Bureaus' decision an agency action because, *inter alia*, the Bureaus will not have to revisit their examination of alternatives at the programmatic scale).

Second, the Bureaus had the discretion to prohibit offshore fracking and acidizing or impose conditions on their use to protect ESA-listed species. No party claims that the Bureaus lack such discretion here. Nor could they. For example, the Bureaus considered an alternative that would prohibit the discharge of well stimulation chemicals to "eliminate any potential effect of [these] discharges . . . on the marine environment." 6-ER-1176. The Bureaus' decision therefore meets the definition of "agency action" under the ESA. "The fact that consultation would only address impacts at the programmatic level does not excuse the need to do so." *Cal. ex. Rel Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 912 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009).

B. The Bureaus' and Exxon's Attempts to Distinguish Controlling Caselaw Fail

The Bureaus and Exxon unsuccessfully attempt to distinguish relevant caselaw. *See* Fed. Br. 26-27, Exxon Br. 45-46. In *Pacific Rivers Council*, discussed above, the Ninth Circuit found a management plan promulgated by the Forest Service constituted agency action under the ESA. 30 F.3d at 1052-53. The plan did not directly authorize private activity, but established criteria by which the Forest Service could later conduct timber sales, permit grazing, or allow road construction. *Id.*

The Bureaus assert that no similar specific guidelines concerning future well stimulation treatments exist here. Fed. Br. 27. But the PEA and FONSI do, in fact, include a decision about future well stimulations—by evaluating and then dismissing alternatives that would place limitations on offshore fracking, they allow the Bureaus to approve such practices with no standards (e.g., limitations on discharge, minimum depth requirements) in place. That the Bureaus elected not to impose binding criteria upon future permittees does not negate the fact that the PEA and FONSI constitute a programmatic action setting an affirmative direction for well stimulations and how these activities are conducted.

In *Washington Toxics*, the Ninth Circuit held that EPA's registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) constituted agency action under the ESA. *Wash. Toxics v. U.S. EPA*, 413 F.3d

1024, 1031-33 (9th Cir. 2005). Exxon and the Bureaus argue that EPA's registration of pesticides allowed individuals to immediately distribute the pesticides, and that because the PEA and FONSI here do not similarly authorize individual offshore fracking activity there is no agency action. Fed. Br. 26-27, Exxon Br. 45-46. But *Washington Toxics* did not hinge on the immediacy of pesticide use; instead, the case focused on whether EPA's regulation of a pesticide under FIFRA barred suit under the ESA. 413 F.3d at 1031.[7] Furthermore, EPA's registration of pesticides does not mean that individuals can automatically use them—once a pesticide is registered by EPA, there are still potential regulatory approvals needed before individual application. *See id.* at 1032 (discussing need for Clean Water Act permit before pesticide discharge). Much like *Washington Toxics*, the action here is subject to ESA consultation even though more steps will be taken before individual offshore fracking events can occur.

Exxon also falls short in its attempt to analogize this case to *Center for Food Safety v. Johanns*. *See* Exxon Br. 47. In *Johanns*, the plaintiffs alleged that an agency's internal policies constituted agency action under the ESA, and the agency's failure to consult on the policies violated the ESA. 451 F. Supp. 2d 1165,

[7] Likewise, the Bureaus are wrong in asserting that this Court found agency action in *Karuk Tribe* because the action allowed mining activity "immediately." Fed. Br. 25-26. As explained above, *Karuk Tribe* dealt with whether the agency affirmatively authorized a private activity to proceed. *Supra* p. 36.

1189-90 (D. Haw. 2006). The District of Hawaii found no "agency action" because the ESA "contemplates something more tangible than internal agency protocols and policies." *Id.* at 1190. Here, no party can seriously argue that the PEA and FONSI amount to mere "internal policies" regarding future offshore fracking permits. Rather, the PEA and FONSI allow well stimulations at all active leases on the Pacific OCS. 7-ER-1201.

The Bureaus' PEA and FOSNI authorizing offshore fracking and acidizing on the Pacific OCS constitute agency action under the ESA. As such, the agencies' failure to consult before issuing that decision violates the ESA. *See Karuk Tribe*, 681 F.3d at 1030.

V. THE BUREAUS' FAILURE TO PREPRE AN EIS VIOLATES NEPA

The Bureaus violated NEPA by refusing to prepare an EIS. NEPA demands that the Bureaus prepare an EIS if there are "substantial questions" about whether offshore fracking and acidizing "*may*" significantly affect the environment. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). NEPA regulations require agencies to consider ten factors in determining whether a federal action may have a significant impact. 40 C.F.R. § 1508.27(b). An action may be significant if any one of the significance criteria it met. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1220

(9th Cir. 2008). The Bureaus' authorization of offshore fracking and acidizing on the Pacific OCS implicates several NEPA significance factors and clears this "low standard." *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011).

A. The Impacts of Offshore Fracking and Acidizing off California Are Highly Controversial

NEPA requires the preparation of an EIS when the effects of a federal action "are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). This criterion is met here.

A proposal is highly controversial when "substantial questions are raised as to whether a project . . . may cause significant degradation" of a resource, or when "there is a substantial dispute [about] the size, nature, or effect of" the action. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1030-31 (9th Cir. 2007) (alterations in original, citations and internal quotation marks omitted). "A substantial dispute exists when evidence, raised prior to the preparation of [a] . . . FONSI . . . casts serious doubt upon the reasonableness of an agency's conclusions." *Nat'l Parks Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (citation omitted). When such doubt is raised, NEPA then places the burden on the agency to present "a 'well-reasoned explanation' demonstrating why those responses disputing the EA's conclusions 'do not . . . create a public controversy.'" *Id.* (citation omitted). The Bureaus failed to satisfy this burden.

The record in this case presents a classic example of a highly controversial project. Numerous scientists, agencies, and elected officials repeatedly questioned the Bureaus' conclusions and the severity of the environmental impacts of offshore fracking and acidizing. For example, a letter from more than 30 scientists disputed the Bureaus' conclusion that offshore fracking and acidizing would not have significant environmental impacts. 2-SER-520-22. In their letter, the scientists referenced numerous studies indicating that these practices pose a range of harmful impacts to human communities and ecosystems, including increasing toxic air and water pollution and increasing the risk of earthquakes. *Id.*

The California Coastal Commission also expressed concerns over the potential impacts of offshore fracking on coastal resources, including the chronic effects of fracking pollutants on marine life, 2-SER-527, 2-SER-529-31, and disputed the Bureaus' foundational assumption that the amount of well stimulations used in the future would be low. 2-SER-529. California's Division of Oil, Gas and Geothermal Resources—an agency that regulates oil and gas activities on state and private lands—questioned the Bureaus' conclusion that discharges of well stimulation fluids would not have significant impacts. 2-SER-300. The agency also expressed its support for an alternative that would prohibit the discharge of well stimulation chemicals into the ocean. *Id.*

Additionally, the Bureaus received multiple comments from federal, state, and local officials voicing their opposition to the use of well stimulations in the Pacific Ocean and the Bureaus' conclusion that these practices would not have significant environmental impacts. *See, e.g.*, 1-SER-144-46 (comments from members of U.S. Congress), 2-SER-523-25 (comments from state legislators), 2-SER-540-41 (Los Angeles City Council member's comments). One letter from 11 California state legislators expressed concern over the "troubling shortcomings" of the Bureaus' analysis and noted that the proposal "undermines California's . . . ability to protect its coastal resources and public health." 2-SER-523-25. The Bureaus also received over 5,300 comments from individuals opposed to the agencies' proposal. 7-ER-1462.

Record evidence demonstrates the validity of these concerns. *See, e.g.*, 2-SER-345 (study noting use of hydrofluoric acid in wells "is of great concern because of its very high acute mammalian toxicity and neurotoxicity" and total accumulated load from its use can become significant); 1-SER-140 (study noting the discharge from acidizing is highly acidic, and can contain chemical concentrations that exceed acute or chronic toxicity values even after dilution); 2-SER-465 (study documenting harmful air pollution from well stimulation activities); *see also* 2-SER-530 (state agency noting lack of data for 70 percent of chemicals used in fracking).

These comments from knowledgeable agencies, organizations, and individuals opposing the Bureaus' findings and conclusions—including from agencies charged with protecting or managing some of the affected resources—are exactly the sort of criticisms that courts have held demonstrate an action is highly controversial. *See Nat'l Parks Conserv. Ass'n v. Semonite*, 916 F.3d 1075, 1083-84 (D.C. Cir. 2019); *see also Found. for N. Am. Wild Sheep v. USDA*, 681 F.2d 1172, 1182 (9th Cir. 1982) (state agencies' comments expressing disagreement with EA's conclusions create "precisely the type of 'controversial' action for which an EIS must be prepared"); *Nat'l Parks v. Babbitt*, 241 F.3d at 736 (450 public comments largely opposing the project required EIS).

Fracking is one of the most controversial energy issues of our time. As one court has recognized, "fracking has come under scrutiny in federal, state, and local governments alike, with some states contemplating enacting, or having already enacted, laws banning fracking altogether." *Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d at 1145-46. The degree of controversy surrounding fracking and its use in the Pacific Ocean triggers the Bureaus' duty to prepare an EIS. 40 C.F.R. § 1508.27(b)(4); *see also California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (noting the "continuous and significant public controversy over the environmental effects of offshore oil activities in California").

B. Offshore Fracking and Acidizing Present Highly Uncertain, Unique, or Unknown Risks

NEPA requires an agency to prepare an EIS when an action's effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential . . . effects." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d at 1240 (citations omitted); *see also Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998) ("EA's cursory and inconsistent treatment of sedimentation issues . . . raises substantial questions about . . . the unknown risks to" fish populations). Here, the highly uncertain and unknown effects of offshore fracking and acidizing necessitate the preparation of an EIS.

For example, on the Pacific OCS, the federal government allows oil companies to dump their waste fluids from drilling activities, including well stimulation chemicals, into the ocean. 7-ER-1209, 7-ER-1227. But the effects of these discharges on water quality and marine life are highly uncertain. The Bureaus themselves admit that the "lack of toxicity data" for many chemicals known to be used in fracking "was identified as a problem . . . as was the lack of available data on chronic impacts of these chemicals in the marine environment." 7-ER-1380.

Many other documents in the record underscore the uncertainty of the impacts of well stimulations on the marine environment. S*ee, e.g.*, 2-SER-520-22

(letter from over 30 scientists noting "significant data gaps on basic questions regarding offshore fracking and acidizing," including inadequate reporting of well stimulation events, the composition of well stimulation fluids, and toxicity data for common chemicals in fracking and acidizing fluids); 2-SER-342 (study noting that many chemicals used in acidizing "have no toxicological or even basic chemical property information available" and the high acidity "creates uncertainties as to how chemicals will transform or how much heavy metal will leach out"); 2-SER-530 (data are lacking for roughly 70 percent of the chemical additives used in fracking). Indeed, a report from California scientists found that "no studies have been conducted on the toxicity and impacts of well stimulation fluids discharged in federal waters to the marine environment." 1-SER-137.

As the Ninth Circuit has made clear, "lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it." *Nat'l Parks v. Babbitt*, 241 F.3d at 733. That is especially true here where the PEA represents the *first time* the Bureaus *have ever* analyzed the impacts of offshore fracking and acidizing on the Pacific OCS. *See Anderson v. Evans*, 371 F.3d 475, 492 (9th Cir. 2004) (the "highly uncertain" impact that a first-ever whale hunt would have on the local whale population supported the need for an EIS).

The Bureaus had numerous ways they could have obtained additional information, such as studying the effects of ongoing well stimulations in the Gulf

of Mexico. *See* 2-SER-438-49 (acknowledging offshore fracking is occurring in the Gulf of Mexico). The Bureaus could have also developed a toxicity testing protocol specifically designed to measure impacts to marine organisms associated with exposure to waste discharges from well stimulation treatments. *See* 2-SER-531 (comments from California Coastal Commission urging the Bureaus to do so before allowing the discharge of chemicals used in well stimulations).

Instead, the Bureaus arbitrarily relied on the lack of information to assume there will not be significant impacts on the environment. *See, e.g.*, 7-ER-1395, 7-ER-1417; *cf.*, *Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (agency cannot avoid duty to prepare EIS through conclusory assumptions). The Bureaus also illogically assumed that, to the extent there were any impacts, those impacts would be alleviated by the toxicity testing required under the Clean Water Act permit for discharges from oil and gas operations on the Pacific OCS. *See, e.g.*, 7-ER-1388. However, the permit has *no limit* on the amount of fracking and acidizing chemicals that can be discharged when combined with produced water. *See* SER-589-90, 3-SER-592. Moreover, as the Bureaus themselves acknowledge, because the permit's toxicity testing requirement "is not specifically coordinated with the conduct of WST activities . . . WST fluid constituents may not be present in the sampled discharges." 7-ER-1378. Toxicity testing will thus not prevent the potentially significant impacts of the discharge of

well stimulation chemicals into the marine environment. As with the controversy surrounding fracking and acidizing, the admitted uncertainty of its impacts warrants preparation of an EIS. 40 C.F.R. § 1508.27(b)(5).

C. Offshore Fracking and Acidizing Have Cumulatively Significant Impacts

NEPA requires an agency to prepare an EIS where an action may have "cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). That standard is met here.

As explained above, offshore fracking and acidizing increase the numerous risks inherent in offshore drilling. The practices emit dangerous air pollutants, including carcinogens and endocrine disruptors. 2-SER-465, 2-SER-479, 2-SER-388-89. For example, higher incidents of babies born with birth defects have been documented from mothers who live within a 10-mile radius of fracked wells, with benzene being a suspected cause. 2-SER-388-89, 2-SER-399. These practices also increase vessel traffic given the need to supply the platforms with the chemicals and other materials used in such operations. *E.g.*, 7-ER-1208, 1347. With increased vessel traffic comes increased risk of ship strike, *e.g.*, 7-ER-1361, a threat that scientists believe is having significant impacts on some populations of whales. *See* 2-SER-499.

Offshore fracking and acidizing also increase the risk of failures of pipelines, well control, and other equipment. For example, a study found that older

wells can become pathways for fluid migration and the high injection pressures used in fracking can "increase this risk significantly." 1-SER-135; *see also, e.g.*, 2-SER-362-63 (study finding chance of well casing damage increases with age); 2-SER-451-52 (same); 2-SER-507 (study finding risk of pipeline failure increases rapidly after 20 years). Such risks are of particular concern for federal waters off California, where oil companies have already been drilling for 30 to 50 years. 7-ER-1218.

Further, these practices emit greenhouse gas pollution at every phase of the process, from the ships used to supply the platforms to the venting or flaring of gases or vapors produced during well stimulations, to the consumption of the extracted oil. *See* 7-ER- 1367-68. Offshore fracking and acidizing also prolong offshore drilling operations by allowing oil companies to extract oil that would otherwise be unrecoverable. *See* 7-ER-1201, 7-ER-1218.

The Bureaus cannot dismiss the significance of these cumulative impacts by claiming offshore drilling activities are regulated and infrastructure is inspected. *See* 7-ER-1461. Indeed, this Court has already "seriously question[ed] . . . whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance" and instructed that "an EIS must be prepared as long as 'substantial questions' remain as to whether the measures will completely preclude significant environmental effects." *Conner*, 848 F.2d at 1450

(citations omitted). At the very least, these facts establish that the use of offshore fracking and acidizing *may* have significantly cumulative impacts, triggering the Bureaus' obligation to prepare an EIS. Their failure to do so was unlawful.

D. Offshore Fracking and Acidizing Trigger Other Significance Factors

The Bureaus' authorization of offshore fracking and acidizing in federal waters off California implicate other significance factors. Specifically, these practices affect unique geographic areas given that they will be used near historic or cultural resources and in ecologically critical areas; and may adversely affect endangered or threatened species. 40 C.F.R. § 1508.27(b)(3), (9).

First, the authorization of offshore fracking and acidizing affect unique geographic areas. The Santa Barbara Channel, where most offshore oil and gas drilling occurs on the Pacific OCS, 7-ER-1240-42, is home to numerous important cultural resources. The area is home to submerged Chumash remains and sacred Chumash natural cultural marine resources, including dolphins and abalone. 2-SER-518. The Chumash Peoples depend upon the cultural resources within the Santa Barbara Channel to maintain their ways of life, cultural practices, and ancestral connections. *Id.* Congress expressly designated the Channel Islands National Park to protect important cultural resources, including "archaeological evidence of substantial populations of Native Americans." 16 U.S.C. § 410ff(6);

see also 2-SER-313 (federal government's recognition that the Park "hosts . . . culturally significant resources.").

The area is also incredibly biologically diverse. For example, it hosts the world's densest seasonal congregation of endangered blue whales, *see* 2-SER-373, 7-ER-1286; is home to the only breeding population of brown pelicans in California and hosts half the world's population of ashy storm-petrels, 2-SER-502; and is designated critical habitat for black abalone and western snowy plovers. 7-ER-1277, 7-ER-1300; *see also* 2-SER-370 (describing biological significance of the area, including its designation as United Nations, Educational, Scientific and Cultural Organization Biosphere Reserve); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1195-96 (N.D. Cal. 2004) (recognizing an area that provides biological connectivity for northern spotted owls as an ecologically critical area under NEPA).

Second, the use of offshore fracking and acidizing may adversely affect numerous species protected under the ESA. In its PEA, for example, the Bureaus recognize that the discharge of fracking wastewater into the ocean may expose numerous ESA-listed species to potentially toxic levels of well stimulation chemicals and the loss of prey similarly exposed. 7-ER-1352; *see also* 7-ER-1355 (accidental release of chemicals during transport and delivery may kill or otherwise adversely affect several listed marine mammals); *see Klamath-Siskiyou Wildlands*

Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1081 (E.D. Cal. 2004) (agency's conclusion that action "may affect, is likely to adversely affect" species is "[a]t a minimum, . . . an important factor supporting the need for an EIS").

Each of the foregoing factors means the Bureaus should have prepared an EIS. Together, they provide an overwhelming case for the Bureaus to prepare the kind of comprehensive environmental analysis that the use of offshore fracking and acidizing in federal waters off California has never received.

VI. THE PEA FAILS TO TAKE A HARD LOOK AT THE IMPACTS OF OFFSHORE FRACKING AND ACIDIZING IN VIOLATION OF NEPA

The Bureaus' PEA and FONSI violate NEPA. The Center adopts the arguments of the State of California regarding why the Bureaus' PEA fails to take the "hard look" required by NEPA and offers these additional arguments. Specifically, the PEA fails to take the requisite hard look at the impacts of offshore fracking and acidizing by ignoring the indirect impacts of prolonging oil and gas drilling off California and the cumulative impacts of these activities. The PEA also fails to examine a reasonable range of alternatives to allowing the unrestricted use of these oil extraction techniques on all active leases on the Pacific OCS. The Bureaus' PEA and FONSI are unlawful. *See Blue Mtns.*, 161 F.3d at 1212.

A. The PEA Ignores Indirect and Cumulative Impacts from Prolonged Offshore Drilling

The Bureaus' PEA fails to consider the indirect and cumulative impacts of prolonged offshore oil and gas drilling. NEPA requires an analysis that evaluates both the indirect and cumulative impacts of an agency decision. Indirect impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Cumulative impacts are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7.

Thus, a proper analysis in this case would assess the indirect impacts of prolonged oil and gas drilling off California as well as the cumulative impacts from such activities. The Bureaus' PEA fails on both accounts.

1. The PEA ignores the indirect impacts of prolonged drilling.

The Bureaus' failed to consider the indirect impacts of prolonged offshore oil and gas drilling. The impacts of prolonged drilling are a "reasonably foreseeable" result of authorizing offshore fracking and acidizing. *See id.* § 1508.8(b). Indeed, the entire point of the agencies' proposed action is to allow well stimulations so that oil companies can "enhance the recovery of petroleum and gas from new and existing wells on the [Pacific] OCS, beyond that which could be

recovered with conventional methods," 7-ER-1201, and thereby extend drilling operations. In other words, enhanced production and prolonged offshore oil and gas activity "is not just reasonably foreseeable, it is the project's entire purpose." *See Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (internal quotation marks omitted).

The Bureaus cannot deny that prolonged drilling off California is a reasonably foreseeable result of authorizing well stimulation treatments. The Bureaus' PEA itself repeatedly admits that well stimulation treatments can prolong oil and gas activity. The PEA states, for example, that well stimulations will lead to an "incremental increase in production," 7-ER-1368, and that a decline in oil and gas production on the Pacific OCS "may be more precipitous without the future use of WSTs." 7-ER-1218; *see also* 7-ER-1201, 7-ER-1217 ("WSTs may allow lessees to recover hydrocarbon resources (i.e., oil) that would otherwise not be recovered"); 7-ER-1407 ("WST use may prolong oil production").

The risks of prolonged offshore drilling are widespread and well-documented. For example, longer lifetimes for old reservoirs and wells increase the risk of failures of pipelines, well control, or other equipment. *See e.g.*, 2-SER-362-63 (chance of well casing damage increases with age); 2-SER-451-52 (same); 1-SER-135 (older wells can become pathways for fluid migration and high injection pressures used in fracking can "increase this risk significantly"); 2-SER-507 (risk

of pipeline failure increases rapidly after 20 years). This is especially troubling for the Pacific OCS, where oil companies have been drilling for decades, 7-ER-1218; and many drilling platforms have already surpassed their expected lifetimes. *See* 7-ER-1461 (acknowledging comments that "some platforms are already operating well beyond their estimated lifespan").

The risks are substantial even without equipment failure or other accidents. For instance, as the Bureaus acknowledge, "the use of acid for routine well maintenance is common at platforms on the [Pacific] OCS." 7-ER-1345; *see also* 2-SER-517 (comments from API noting that "nearly all relevant wells require acid treatments . . . to get appreciable production rates"). Studies demonstrate that acid maintenance "is such a common and routine procedure used in wells that the total accumulated load of [hydrofluoric acid] in a region *becomes significant*." 2-ER-345 (emphasis added). Hydrofluoric acid "is of great concern because of its very high acute mammalian toxicity and neurotoxicity." *Id.*

Additionally, offshore oil and gas activity causes noise pollution that can disrupt and harm marine mammals, *see, e.g.*, 2-SER-501, 7-ER-1235, 7-ER-1399; light pollution that can kill and harm seabirds, *e.g.*, 2-ER-383; increased vessel traffic that can run over marine species, *e.g.*, 7-ER-1361; and risks oil spills that can harm important cultural resources, marine life, and coastal communities. *See, e.g.*, 2-SER-518 (Santa Barbara Channel is home to submerged Chumash remains

and sacred Chumash cultural resources, including dolphins and abalone); 16 U.S.C. § 410ff(6) (designating Channel Islands National Park to protect important cultural resources, including "archaeological evidence of substantial populations of Native Americans"); *In re Plains All Am. Pipeline, L.P.*, 245 F. Supp. 3d 870, 883 (S.D. Tex. 2017) (describing failure of coastal pipeline in California that "spilled oil into the Pacific Ocean" and "killed nearly 200 birds and more than 100 marine mammals, including dolphins and sea lions"). Offshore drilling also emits greenhouse gas pollution that is contributing to the climate crisis, *e.g.*, 2-ER-353, 2-ER-426-436, both directly through emissions from the extraction process, and indirectly through the consumption of the extracted oil and gas. *See, e.g.*, 7-ER-1367-68. But the Bureaus made no attempt to analyze the increased harms from prolonging offshore drilling.

It is the essence of arbitrary decisionmaking for the Bureaus to claim they must allow offshore fracking and acidizing so that oil companies can recover oil that would be unrecoverable using conventional methods, but then refuse to analyze the impacts of prolonged drilling operations. As in *California v. Norton*, the Bureaus' decision to authorize the use of offshore fracking and acidizing on the Pacific OCS "extend[s] the life of oil . . . production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production," 311 F.3d at 1173, and the Bureaus' NEPA evaluation must address these effects

and perils. Its failure to do so renders the PEA and FONSI arbitrary and capricious. *See Ocean Advocates*, 402 F.3d at 868 (agency failed to take a "hard look" at the impacts of a permit authorizing an addition to an existing dock at an oil refinery when it ignored the increased risk of tanker traffic and attendant increased risk of oil spills); *see also Sierra Club v. FERC*, 867 F.3d at 1374 (an EIS on a permit authorizing the construction of a natural gas pipeline must analyze the indirect effects of greenhouse gas emissions from burning the gas the pipeline would transport "as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions'") (citations omitted).

2. The Bureaus failed to properly examine the cumulative impacts from ongoing offshore oil and gas activity.

The only place where the Bureaus even attempt to address impacts from ongoing offshore drilling is in the cumulative impacts section of the PEA where the Bureaus list "oil and gas development and production activities in Federal and State waters" as an activity contributing to cumulative impacts. 7-ER-1411. Apart from this passing reference, the Bureaus do not actually analyze the impacts form such activities. But a cumulative impacts analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004) (citation omitted).

The Bureaus' failure to properly evaluate cumulative impacts stems from their misguided assumption that they need not to so because the impacts of well stimulations are small when compared to other existing activity. For example, the PEA states that the greenhouse gas emissions from the "incremental increase in production" from the use of well stimulations "is expected to be small *compared with* all production on all remaining [Pacific] OCS wells and reservoirs . . . and the annual GHG emissions from petroleum in California as a whole." 7-ER-1368 (emphasis added). Similarly, the PEA discounts any analysis of the cumulative impacts of ship strikes because the amount of well stimulation-related vessel traffic is small compared to overall vessel traffic in the area, 7-ER-1354; and discounts any analysis of the cumulative impacts of the fluid injected into a well during a well stimulation event because the amount is small compared to the overall volume from routine operations. 7-ER-1364.

Such comparative approach defeats the purpose of a cumulative impacts analysis. While the Bureaus might consider the impacts of well stimulation treatments to be small, that does not absolve the agency from their obligation to consider the combined impacts of well stimulation treatments, continued offshore oil and gas drilling, and the other activities impacting the marine life and other resources of the Pacific Ocean. *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d at 994 ("Sometimes the total impact from a set of actions may be greater than

the sum of the parts."); *Te-Moak Tribe*, 608 F.3d at 603-06 (EA's cumulative impact analysis inadequate because it failed to analyze impacts from other projects that would impact the same resources).

In short, the Bureaus' mere mention of continued offshore oil and gas drilling in federal waters does not constitute the "quantified or detailed information" required. *Te-Moak Tribe*, 608 F.3d at 603 (citations omitted). Without this information, "neither the courts nor the public . . . can be assured that the [Bureaus] provided the hard look that it is required to provide." *Id.* (citation omitted).

B. The Bureaus Failed to Examine a Reasonable Range of Alternatives

The Bureaus also violated NEPA by failing to consider a reasonable range of alternatives. NEPA requires the Bureaus to consider, address, and explain "all reasonable alternatives" to allowing well stimulations. 40 C.F.R. § 1502.14(a); *see* 42 U.S.C. § 4332(2)(C)(iii) (requiring "alternatives to the proposed action"). This alternatives requirement is "the heart" of NEPA review. *See* 40 C.F.R. § 1502.14. "The existence of a viable but unexamined alternative renders an EA inadequate." *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (citations omitted).

Here, the Bureaus examined only four alternatives in detail: (1) authorizing well stimulations; (2) authorizing well stimulations at depths of more than 2,000

feet below the seafloor only; (3) authorizing well stimulations, but prohibiting the dumping of wastes from well stimulation into the ocean; and (4) prohibiting the use of well stimulations. *E.g.*, 7-ER-1203-04. In considering only these alternatives, the Bureaus failed to fully and meaningfully consider all reasonable alternatives to allowing the unrestricted use of offshore fracking and acidizing.

The Bureaus failed to examine several available alternatives suggested by other agencies and the public during the comment period. As one illustration, the Bureaus failed to examine an alternative suggested by state oil regulators that would require testing of "permitted discharge waters following each WST to address data gaps regarding WST fluid toxicity." 2-ER-299.

The failure to examine such an alternative is particularly arbitrary considering the Bureaus' acknowledgement that there are "critical data gaps" regarding the impacts of well stimulation chemicals on the marine environment, 7-ER-1380, and its assertion that "toxicity monitoring . . . would protect against the discharge of WST constituents at toxic levels," 7-ER-1388, despite also recognizing that the applicable discharge permit does not require sampling concurrently with well stimulation events. *See* 7-ER-1378 (since water sampling requirements under the permit are "not specifically coordinated with the conduct of WST activities . . . WST fluid constituents may not be present in the sampled discharges"). Indeed, the permit only requires toxicity testing only once per

quarter, which can be, and often is, reduced to only once per year, 7-ER-1377, meaning many discharges go unmonitored. *Cf.*, *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 869-71 (9th Cir. 2004) (upholding range of alternatives in an EIS where an alternative including continual monitoring of the affected habitat).

The Bureaus also failed to consider an alternative that would limit the number of well stimulation treatments authorized each year, or an alternative that would restrict when well stimulations could be conducted, such as prohibiting their use during summer and fall when endangered blue whales are present. *See* 2-SER-322 (comments raising these as possible alternatives).

Each of these alternatives were available and feasible. The Bureaus' failure to evaluate them in the PEA renders it inadequate and unlawful. Indeed, courts routinely reject a NEPA analysis where, as here, the agency failed to consider alternatives that would reduce the extent of the permitted activity, and thus reduce the harm to the affected natural resources. *See, e.g.*, *W. Watersheds Proj.*, 719 F.3d at 1053 (agency violated NEPA in failing to examine an alternative that would reduce the amount of acreage open to grazing in its EA); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710-11 (10th Cir. 2009) (agency arbitrarily failed to examine an alternative that would have reduced the amount of oil and gas development allowed under a land management plan).

The Bureaus' failure to consider alternatives that would reduce the environmental impacts of well stimulations is particularly troubling given that OCSLA requires the Bureaus to ensure "environmental safeguards" are in place, 43 U.S.C. § 1332(3), and to "balance orderly energy resource development with protection of the human, marine, and coastal environments." *Id.* § 1802(2)(B); *see Westlands Water Dist.*, 376 F.3d at 866 ("[w]here an action is taken pursuant to a specific statute, the statutory objectives . . . serve as a guide by which to determine . . . reasonableness").

Moreover, NEPA requires the Bureaus to "briefly discuss the reasons for [alternatives] having been eliminated." 40 C.F.R. § 1502.14(a). The Bureaus did not explain why they failed to consider these alternatives, instead simply stating that "no commenters . . . suggested an additional alternative for review that would lend itself to meaningful analysis." 7-ER-1445.

The Bureaus' EA and FONSI are thus improper and violate the fundamental notion that NEPA review must be conducted "not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

VII. THE DISTICT COURT PROPERLY ENJOINED THE BUREAUS' ISSUANCE OF PERMITS ALLOWING OFFSHORE FRACKING AND ACIDIZING PENDING COMPLETION OF ESA CONSULTATION

The District Court did not abuse its discretion in enjoining the Bureaus from

issuing permits and plans allowing offshore fracking and acidizing pending completion of ESA consultation with FWS. The District Court applied the correct test for injunctive relief and its decision is well-supported by the facts.

> In issuing a permanent injunction, a court must find:
>
> (1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Nat'l Wildlife Fed'n, 886 F.3d at 817 (citation omitted). When an injunction may be lifted after an agency's compliance with the law, "the first prong of the injunction test should be modified to match the analogous prong in the preliminary injunction test: that the plaintiffs are 'likely to suffer irreparable harm in the absence of preliminary relief.'" *Id.* (citation omitted).

The District Court applied this test, analyzed each of the factors, and concluded that they each favored an injunction. *See* 1-ER-0042-43. The injunction is narrowly tailored to remedy the Bureaus' ESA violation—prohibiting the agencies from issuing permits allowing offshore fracking and acidizing until the ongoing consultation with FWS is complete. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.").

Courts have consistently recognized that injunctions are an appropriate remedy in environmental cases. As the Supreme Court has explained:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). That is especially true for violations of the ESA. As this Court recently reiterated:

> The ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted. The ESA removes the latter three factors in the four-factor injunctive relief test from our equitable discretion. When considering an injunction under the ESA, we presume that remedies at law are inadequate, that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction.

Nat'l Wildlife Fed'n, 886 F.3d at 817 (citations omitted).

Intervenors' claims that the District Court abused its discretion in finding the Center would be irreparably harmed because the District Court supposedly "presumed that the [Bureaus'] procedural ESA violation resulted in irreparable harm," Exxon Br. 49, DCOR Br. 51, are wrong.

A. The District Court Properly Found the Center Would Suffer Irreparable Harm Absent an Injunction

The District Court did not abuse its discretion in finding that the Center would likely suffer irreparable harm absent an injunction. The District Court found—based on the agencies' own determinations—that authorizing offshore

fracking and acidizing before programmatic consultation is complete presents a substantial risk of harm to ESA-protected species, and that this harm would be irreparable. *See* 1-ER-002, 1-ER-0034, 1-ER-0038-39, 1-ER-0042-43.

This finding is adequately supported by the record. For example, the Bureaus acknowledge that the use of offshore fracking and acidizing could adversely affect ESA-listed sea otters and seabirds through oil spills that could kill individual animals. 5-ER-0951-52; *see also* 5-ER-0938, 5-ER-0943, (increased light pollution and vessel noise can harm ESA-listed seabirds and other marine life). Additionally, the Bureaus' PEA states that the discharge of fracking wastewater into the ocean may affect fish, seabirds, and marine mammals (including sea otters), through localized exposure to potentially toxic levels of well stimulation chemicals. 7-ER-1352. The Center submitted declarations describing how these impacts harm their members' aesthetic, recreational, spiritual, and other interests in the affected wildlife and habitat. 1-SER-065-92; *cf.*, *California v. Azar*, 911 F.3d at 568 (where a district court applied the correct test, this Court will overturn an injunction only if it is "illogical . . . implausible, or . . . without support in inferences that may be drawn from the facts in the record.").

These harms are the definition of irreparable. This Court has consistently held that harm to a member of an ESA-protected species is irreparable. *See Nat'l Wildlife Fed'n*, 886 F.3d at 818. This is because "[t]he ESA accomplishes its

purposes in incremental steps, which include protecting the remaining members of a species" and "[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Id.* (citations omitted); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (logging that harms a plaintiff's "ability to 'view, experience, and utilize'" an area in an undisturbed state is "actual and irreparable injury" that "satisfies the 'likelihood of irreparable injury' requirement articulated in *Winter*").

Exxon's argument that the "risk of irreparable harm is "mitigate[d]" because the Bureaus might conduct ESA review on individual permits in the future, Exxon Br. 49, rings hollow. This Court has specifically rejected the notion that site-specific review can cure a failure to consult at the programmatic level. *See Conner*, 848 F.2d at 1455 (rejecting agency's invitation "to carve out a judicial exception to [the] ESA's clear mandate that a comprehensive biological opinion . . . be completed before initiation of the agency action"); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (noting the importance of comprehensive biological opinions). Were it otherwise, "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest." *Nat'l Wildlife Fed'n*, 524 F.3d at 930. That is particularly true here, where the possibility of site-specific review is purely speculative and, as the District Court recognized, the Bureaus "have made no clear commitment" to

withhold the issuance of well stimulation permits pending the completion of consultation. 1-ER-0043.

The only case Exxon cites in support of its argument, Exxon Br. 49, does not dictate otherwise. In *Monsanto Co. v. Geertson Seed Farms*, the plaintiffs challenged an agency's decision to completely deregulate a species of genetically modified alfalfa, alleging the agency issued its decision without complying with NEPA. 561 U.S. 139, 144 (2010). The district court agreed and vacated and remanded the agency's decision. *Id.* at 157. The district court also issued an injunction preemptively prohibiting the agency from implementing any partial deregulation during the remand period. *Id.* The Supreme Court overturned this latter portion of the order "[i]n light of the[] particular circumstances" of the case. *Id.* at 164. These "particular circumstances" included the fact that vacatur of the agency's decision, the presumptive remedy for unlawful agency actions, already provided the relief the plaintiffs' sought—removing the product from lawful commercial use or sale—and thus remedied any irreparable harm that could result from the complete deregulation. *Id.* at 165-66. Additionally, the Supreme Court held that the district court could not enjoin a hypothetical partial deregulatory decision not before it. *Id.* at 162-63.

Here, in contrast, the District Court did not vacate the agencies' PEA and FONSI, so the risk of irreparable harm stemming from the Bureaus' issuance of

well stimulation permits remained. Moreover, the injunction did not address a hypothetical future agency action not before the District Court. Rather, the legality of the Bureaus' decision to authorize offshore fracking and acidizing at all active leases on the Pacific OCS without ESA consultation was the precise question before it. The District Court enjoined the Bureaus from acting on that decision until ESA consultation with FWS is complete to prevent the specific, irreparable harm that could result from such practices including, oil spills that could kill or harm sea otters and seabirds, among other harms.

B. The District Court Properly Determined the Remaining Factors Favor an Injunction

The District Court correctly determined that the remaining factors favor injunctive relief. Under the clear and consistent caselaw of the Ninth Circuit and the Supreme Court, the balance of hardships and public interest factors *always* sharply favor an injunction in ESA cases. *Nat'l Wildlife Fed'n*, 886 F.3d at 817; *see also Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996) (same). This is because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Tenn. Valley Auth.*, 437 U.S. at 194. Accordingly, courts "may not use equity's scales to strike a different balance." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987).

The District Court was thus not required to make any factual findings about the balance of hardships or public interest. Nevertheless, the District Court made specific findings, and those findings are valid. As the District Court found, the Center's harms are not capable of being remedied by monetary damages. 1-ER-0043; *see also Amoco Prod. Co.*, 480 U.S. at 545 (environmental injuries can "seldom be adequately remedied by money damages"). The Center did not seek monetary damages, but rather the declaratory and injunctive relief the Court issued. 1-ER-0043; 3-ER-0394. Likewise, the District Court correctly determined that the balance of hardships and public interest tips sharply in favor an injunction because the public interest is served by the federal government's compliance with the law. 1-ER-0043; *see also Se. Alaska Conserv. Council v. Army Corps of Engr's*, 472 F.3d 1097, 1101 (9th Cir. 2006) ("the public interest strongly favors preventing environmental harm").

Finally, even if this Court were to find that the District Court somehow abused its discretion in issuing injunctive relief—which it did not—the Center is, at a minimum, entitled to the statutory remedy of vacatur of the PEA and FONSI. While the Center's ESA claims arise under the citizen-suit provision of the ESA, the ESA contains no internal standard of review, so section 706 of the APA governs the standard of review. *See W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). Under the APA, a reviewing court "shall . . . hold

unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Accordingly, vacatur is the presumptive remedy for agency actions held contrary to law under the APA or any other statute. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."); *see also FCC v. Nextwave Personal Commc's,* 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance' with law, which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.") (citation omitted).

Here, vacatur of the PEA and FONSI would "nullify" or "cancel" the documents, such that it was as though they "no longer existed." *See Massachi v. Astrue*, 486 F.3d 1149, 1154, n.21 (9th Cir. 2007) (defining vacate, citations omitted). This would reinstate the moratorium on offshore fracking and acidizing on the Pacific OCS that existed prior to the Bureaus' publication of the FONSI. *See* 1-ER-0011-12. The narrow injunctive relief ordered by the District Court thus had the same practical effect as vacatur of the Bureaus' PEA and FONSI.

Consequently, whether the issue is viewed through the lens of the District Court's narrowly crafted injunction or from the perspective of the "ordinary result" of vacatur in APA litigation, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), the Center is entitled to relief that halts the Bureaus' permitting of harmful fracking and acidizing until and unless the agencies come into compliance with the law.

C. Intervenors' Other Arguments Lack Merit

DCOR makes additional arguments against the injunction. Specifically, DCOR argues the District Court abused its discretion in denying DCOR's motion to amend the judgment, DCOR Br. 46-47, and the Center is not entitled to injunctive relief because it did not brief the issue in its opening summary judgment brief. *Id.* at 46-47. Both arguments are meritless.

First, the District Court did not abuse its discretion in denying DCOR's motion to amend the judgment. DCOR claims that the District Court abused its discretion because it failed to consider DCOR's alleged economic harms in evaluating the balance of the harms and public interest. DCOR Br. 60. However, in denying DCOR's motion, the District Court expressly considered DCOR's alleged harm and concluded that it did not dictate a different outcome. 1-ER-0004-05.

In doing so, the District Court relied on the line of cases from the Supreme Court and the Ninth Circuit instructing that the ESA "strip[s] courts of their ability

to balance competing interests in deciding whether to enter an injunction to remedy violations of the statute." *Id.* That is particularly true here, because DCOR's alleged financial injuries are only temporary. *See League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) ("irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project"). The District Court twice considered whether injunctive relief was proper and twice concluded it was. The District Court did not abuse its discretion in denying DCOR's motion.

Second, DCOR also wrongly claims that the Center waived its entitlement to injunctive relief by not briefing the issue in its opening summary judgment brief. DCOR Br. 47. As this Court has recognized, "a district court may *sua sponte* order . . . injunctive relief." *Armstrong v. Brown*, 768 F.3d 975, 980 (9th Cir. 2014). DCOR confuses the waiver of a *merits* issue with the waiver of a *remedy* issue. *See Nat'l Parks Conserv. Ass'n v. Semonite*, No. 1:17-cv-01361-RCL, 2019 U.S. Dist. LEXIS 194894, at *5 (D.D.C. Nov. 8, 2019). Indeed, the only cases DCOR cites in support of its argument involved the waiver of a substantive argument on the merits. *See* DCOR Br. 47. As a court in D.C. recently explained, "[q]uestions of remedy are commonly reserved for post-decision motions, and 'it is quite rare for the parties to even mention the question of remedy in their merits brief.'" *Nat'l*

Parks v. Semonite, 2019 U.S. Dist. LEXIS 194894, at *5-6 (citations omitted). The Center did not waive its entitlement to injunctive relief.

CONCLUSION

This Court should uphold the District Court's decision that the Bureaus' PEA and FONSI constitute a final agency action, that the Center's claims are ripe for review, and that the Bureaus decision authorizing the use of offshore fracking and acidizing on the Pacific OCS constitutes agency action under the ESA. The Court should also uphold the injunctive relief ordered by the District Court.

The Court should overturn the District Court's decision that the Bureaus' PEA and FONSI comply with NEPA, and remand the matter to the District Court with instructions that it vacate the Bureaus' PEA and FONSI and order the Bureaus to complete a comprehensive EIS.

Respectfully submitted this 28th day of February, 2020

/s/ *Kristen Monsell*
Kristen Monsell
Emily Jeffers
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Phone: 510-844-7100
Email: kmonsell@biologicaldivesity.org
Email: ejeffers@biologicaldiversity.org

Attorneys for Plaintiffs/Appellees/Cross-Appellants Center for Biological Diversity and Wishtoyo Foundation

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Center for Biological Diversity and Wishtoyo Foundation states that this case is related only to the consolidated appeals and cross-appeals already docketed with this appeal as: Case Nos. 19-55707, 19-55708, 19-55718, 19-55725, 19-55726, and 19-55727.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because this is a cross-appeal brief that contains 16,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: February 28, 2020

/s/ *Kristen Monsell*
Kristen Monsell

Attorney for Plaintiffs/Appellees/ Cross-Appellants Center for Biological Diversity and Wishtoyo Foundation

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 28, 2020

/s/ *Kristen Monsell*
Kristen Monsell

Attorney for Plaintiffs/Appellees/ Cross-Appellants Center for Biological Diversity and Wishtoyo Foundation

STATUTORY AND REGULATORY ADDENDUM

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Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Intervenor-Defendants Exxon Mobil Corporation and/or DCOR LLC.

5 U.S.C. § 551

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 5. Administrative Procedure (Subchs. I — V) > Subchapter II. Administrative Procedure (§§ 551 — 559)

§ 551. Definitions

For the purpose of this subchapter [5 USCS §§ 551 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title [5 USCS § 552]—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [49 USCS §§ 47151 et seq.]; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

> **(A)** prohibition, requirement, limitation, or other condition affecting the freedom of a person;
>
> **(B)** withholding of relief;
>
> **(C)** imposition of penalty or fine;
>
> **(D)** destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [5 USCS §§ 551 etc.].

5 U.S.C. § 704

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 410ff

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 16. CONSERVATION (Chs. 1 — 98) > CHAPTER 1. NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES (§§ 1 — 460ffff-5) > CHANNEL ISLANDS NATIONAL PARK (§§ 410ff — 410ff-7)

§ 410ff. Establishment

In order to protect the nationally significant natural, scenic, wildlife, marine, ecological, archaeological, cultural, and scientific values of the Channel Islands in the State of California, including, but not limited to, the following:

(1) the brown pelican nesting area;

(2) the undisturbed tide pools providing species diversity unique to the eastern Pacific coast;

(3) the pinnipeds which breed and pup almost exclusively on the Channel Islands, including the only breeding colony for nothern fur seals south of Alaska;

(4) the Eolian landforms and caliche;

(5) the presumed burial place of Juan Rodriquez Cabrillo; and

(6) the archaeological evidence of substantial populations of Native Americans;

there is hereby established the Channel Islands National Park, the boundaries of which shall include San Miguel and Prince Islands, Santa Rosa, Santa Cruz, Anacapa, and Santa Barbara Islands, including the rocks, islets, submerged lands, and waters within one nautical mile of each island, as depicted on the map entitled, "Proposed Channel Islands National Park" numbered 159-20,008 and dated April 1979, which shall be on file and available for public inspection in the offices of the Superintendent of the park and the Director of the National Park Service, Department of the Interior. The Channel Islands National Monument is hereby abolished as such, and the lands, waters, and interests therein withdrawn or reserved for the monument are hereby incorporated within and made a part of the new Channel Islands National Park.

43 U.S.C. § 1332

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 43. PUBLIC LANDS (Chs. 1 — 47) > CHAPTER 29. SUBMERGED LANDS (§§ 1301 — 1356b) > OUTER CONTINENTAL SHELF LANDS (§§ 1331 — 1356b)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g) [43 USCS § 1337(g)], will provide affected coastal States and localities with funds which may be

used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf[.][;]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1802

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 43. PUBLIC LANDS (Chs. 1 — 47) > CHAPTER 36. OUTER CONTINENTAL SHELF RESOURCE MANAGEMENT (§§ 1801 — 1866)

§ 1802. Congressional declaration of purposes

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such

activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interest caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

30 C.F.R. § 550.202

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > TITLE 30 -- MINERAL RESOURCES > CHAPTER V--BUREAU OF OCEAN ENERGY MANAGMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER B--OFFSHORE > PART 550--OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF > SUBPART B--PLANS AND INFORMATION > GENERAL INFORMATION

§ 550.202 What criteria must the Exploration Plan (EP), Development and Production Plan (DPP), or Development Operations Coordination Document (DOCD) meet?

Your EP, DPP, or DOCD must demonstrate that you have planned and are prepared to conduct the proposed activities in a manner that:

(a) Conforms to the Outer Continental Shelf Lands Act as amended (Act), applicable implementing regulations, lease provisions and stipulations, and other Federal laws;

(b) Is safe;

(c) Conforms to sound conservation practices and protects the rights of the lessor;

(d) Does not unreasonably interfere with other uses of the OCS, including those involved with National security or defense; and

(e) Does not cause undue or serious harm or damage to the human, marine, or coastal environment.

40 C.F.R. § 1505.2

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1505 -- NEPA AND AGENCY DECISIONMAKING*

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1508.7

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1508 -- TERMINOLOGY AND INDEX*

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.8

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1508 -- TERMINOLOGY AND INDEX*

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1502.14

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT*

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1508.18

This document is current through the February 18, 2020 issue of the Federal Register with the exception of amendments appearing at 85 FR 8726, 85 FR 8747, 85 FR 8749 and 85 FR 8751. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1508 -- TERMINOLOGY AND INDEX*

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.27

This document is current through the February 25, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 10586 and 85 FR 10938. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 40 -- PROTECTION OF ENVIRONMENT* > *CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY* > *PART 1508 -- TERMINOLOGY AND INDEX*

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

43 C.F.R. § 46.325

This document is current through the February 25, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 10586 and 85 FR 10938. Title 3 is current through January 31, 2020.

Code of Federal Regulations > *TITLE 43 -- PUBLIC LANDS: INTERIOR* > *SUBTITLE A -- OFFICE OF THE SECRETARY OF THE INTERIOR* > *PART 46 -- IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969* > *SUBPART D -- ENVIRONMENTAL ASSESSMENTS*

§ 46.325 Conclusion of the environmental assessment process.

Upon review of the environmental assessment by the Responsible Official, the environmental assessment process concludes with one of the following:

(1) A notice of intent to prepare an environmental impact statement;

(2) A finding of no significant impact; or

(3) A result that no further action is taken on the proposal.

50 C.F.R. 402.14(a)

This document is current through the February 25, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 10586 and 85 FR 10938. Title 3 is current through January 31, 2020.

Code of Federal Regulations > TITLE 50 -- WILDLIFE AND FISHERIES > CHAPTER IV -- JOINT REGULATIONS (UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR AND NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE); ENDANGERED SPECIES COMMITTEE REGULATIONS > SUBCHAPTER A > PART 402 -- INTERAGENCY COOPERATION -- ENDANGERED SPECIES ACT OF 1973, AS AMENDED > SUBPART B -- CONSULTATION PROCEDURES

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.